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IN THE

Supreme Court of the United States

October Term 1953

No. ....

THOMAS W. BANKS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Your petitioner, Thomas W. Banks, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on May 27, 1953.

OPINIONS BELOW

District Judge Donovan's memorandum opinion attached to his order deferring until the trial of the general issue the determination of petitioner's motion to dismiss the indictment (R. 21-22), is not reported. Likewise, the oral statements of District Judge Bell, who presided at the trial, overruling petitioner's motion to dismiss the indictment (R. 57-58) and overruling the motion for a new trial

(R. 631-632) are not reported. The opinion of the Court of Appeals affirming the judgment of the District Court (C.A. Proceedings 5-17) is reported at 204 F. 2d 666.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1953 (C.A. Proceedings 17-18). A petition for rehearing, filed June 9, 1953 (C.A. Proceedings 19-31), was denied on June 16, 1953 (C.A. Proceedings 33). By an order entered July 7, 1953 by Mr. Justice Clark, the time for filing a petition for writ of certiorari was extended to and including August 14, 1953. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

After the return of an indictment against him for income tax evasion in three counts covering the years 1945, 1946, and 1947 respectively, petitioner moved to dismiss the indictment on the grounds that there was not sufficient legal evidence before the grand jury to warrant and sustain the return of the indictment and that it was obtained in violation of the Constitution. Petitioner further moved to require a disclosure of matters occurring before the grand jury and to permit the furnishing to his counsel of a stenographic report of the proceedings before the grand jury. The affidavit in support of the motion set forth facts to show that it was impossible for proper legal evidence supporting the indictment to have been presented to the grand jury, as only a single witness had testified, for less than one hour, the government made no claim of any specific unreported income capable of identification in the prosecution years, but instead its case was a so-called "net worth" case with a starting point based on an affidavit executed by the taxpayer in July 1937, seven and one-half years before the beginning of the first prosecution year, and the petitioner denied making any confessions or admissions against interest. Although the government did not file any

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counter affidavit or make a showing of any kind in opposition to the motion or the supporting affidavit, the district court denied the motion, rejecting even petitioner's request that the court itself examine the transcript of the testimony before the grand jury. The court of appeals affirmed. On these facts there is raised the question

1. Whether an indictment so found was an "indictment of a grand jury" within the meaning of the Fifth Amendment, so that petitioner was held to answer for an infamous crime in a manner other than as required by the Fifth Amendment.

There are also presented in this case the further questions

2. Whether the powers of attorney given by petitioner for representation before the Treasury Department in this case authorized his agents, in the course of their negotiations with government representatives and long after the alleged offenses were committed, to make admissions which would be binding on the taxpayer in a criminal prosecution based on the alleged offenses.

3. Where, in a tax evasion prosecution based on evidence of increase in net worth, an expert witness for the government is permitted to testify on the basis of his analysis of the evidence that the defendant had unreported net income in given amounts in the prosecution years and the amount of tax due thereon, whether charts setting forth the witness' conclusions were properly received in evidence as exhibits.

4. Whether petitioner was properly convicted of income tax evasion, prosecuted on the increase in net worth theory, with a starting point eight years before the beginning of the first prosecution year, where the trial court refused requested instructions as to the essential elements of a net worth case, that the gov-

ernment must prove beyond a reasonable doubt petitioner's net worth for each year from its starting point through the end of the last prosecution year, and that the government relied upon circumstantial evidence for proof of its case.

CONSTITUTIONAL AMENDMENT, RULE, AND REGULATIONS INVOLVED

The Fifth Amendment, Rule 6(e) of the Federal Rules of Criminal Procedure, and the pertinent provisions of the Conference and Practice Requirements, Bureau of Internal Revenue, are printed in Appendix A, *infra*, pp. 24-27.

STATEMENT

An indictment was returned against petitioner in the United States District Court for the District of Minnesota on January 14, 1952 charging in three counts a willful attempt to defeat and evade income tax for the years 1945, 1946, and 1947, respectively, in violation of § 145(b) of the Internal Revenue Code, 26 U. S. C. § 145 (b) (R. 1-3). Before being arraigned and pleading to the indictment, petitioner filed a motion to dismiss the indictment on the grounds, among others, that there was no sufficient legal evidence before such grand jury to sustain and warrant the return of the indictment and that it was obtained in violation of law and of the Constitution of the United States (R. 3-4). Petitioner further moved to require a disclosure of matters occurring before the grand jury and to permit the furnishing to his counsel of a stenographic report of the proceedings before the grand jury (R. 4-5).

These motions were supported by an affidavit of one of petitioner's attorneys alleging in substance the following facts: that affiant had discussed the proposed tax case against petitioner with responsible counsel for the Bureau of Internal Revenue and the Department of Justice; that at the time each such counsel had before him a copy of the investigative report of the Internal Revenue Intelligence Unit; that each such counsel advised affiant that the proposed case against petitioner was a so-called "net worth"

case, that there was no claim in the report of any specific unreported income capable of identification which was not included in petitioner's tax returns for the indictment years 1945, 1946, and 1947, and that the government's starting point for its so-called "net worth" case was an affidavit executed by the petitioner in July 1937; that petitioner denied making a confession or admission against interest; that information concerning the proposed indictment of petitioner was furnished to the local newspapers at least three to four days in advance of the meeting of the grand jury; that these newspapers were advised that the grand jury would convene on the morning of January 14, 1952 and that before noon an indictment would be obtained against petitioner; that representatives of the newspapers were in the court room when six new members of the grand jury were sworn in and when the grand jury received its instructions, they were also outside the grand jury room and were able to note the time the grand jury began its session on January 14, 1952, as well as how long it was in session and who testified before it that morning; that it appears from the Minneapolis Morning Tribune for January 15, 1952 that the grand jury was called into session at 10:00 A.M. to receive instructions from Judge Donovan, that at 10:30 A.M. the grand jury started hearing testimony, that at 11:30 A.M. the grand jury sent word that it was ready to make a partial report to the court, and that at 11:45 A.M. the grand jury returned into court the indictment against petitioner; that it appears from the Minneapolis Star for January 15, 1952 that the United States Attorney and an assistant United States Attorney stated that only one witness was called before the grand jury in connection with the presentation of the case against petitioner, that witness being the special agent of the B. I. R. Intelligence Unit who directed the investigation into petitioner's affairs;[1] that from the foregoing the conclusion

[1] During the hearings on the motion it developed that this witness was special agent George McKusick (R. 19; C. A. Proceedings 10).

is inescapable that the total time which could have been spent in presenting evidence to the grand jury had to be less than one hour, since presumably the grand jury spent some time in deliberating (R. 5-9).

Affiant submitted as a matter of common sense that it is a physical and mental impossibility for one man in less than one hour to present properly to a grand jury a "net worth" tax evasion case for the years 1945-46-47 when the starting point is an affidavit executed in 1937, necessitating a showing of petitioner's net worth at the close of each of the calendar years 1937 to 1947 inclusive, what portion of any increase in his net worth at the close of each of those years represented taxable income and what portion represented non-taxable income, what amounts were reasonably expended by petitioner as living expenses in each of those years, that there was a substantial deficiency in the tax paid for the indictment years, and that the substantial deficiency claimed was the result of a willful attempt to defeat and evade income tax (R. 9-11).

The government did not file any counter-affidavit or make any showing to controvert the allegations in the affidavit supporting the motion to dismiss (R. 53). The motion was heard by Judge Donovan who, after hearing argument and receiving briefs, deferred determination thereof until the trial of the general issue (R. 21), although in a memorandum attached to the order the court observed (R. 22):

> • • • Removal of the veil of secrecy from what transpired in the presence of [the grand jury] in my opinion is not warranted at this stage of the proceeding. Granting that the indictment must be based on competent evidence, I am not impressed that the time consumed in the presentation of evidence was too little. In the presentation of evidence before the jury, time is a relative matter.

When the case came on for trial there was further argument of the motion (R. 44-57), after which Judge Bell, who

was sitting for the trial of the case, ruled on the motion in the following language (R. 58):

> * * * I dislike to go into a case if there is some substantial showing that a matter of this kind should have preliminary consideration, and yet this case has been set for trial for six or seven weeks, even [sic] since I returned and have had something to do with it. A jury has been ordered here to start the trial of this case and I am inclined to think that this motion should be overruled and that the trial should be commenced. That will be the order of the Court.

In the course of the trial which followed Joseph A. O'Gordon, an attorney who had represented petitioner in 1950 (R. 200), when called as a government witness identified the power of attorney petitioner had executed authorizing O'Gordon to represent him before the Bureau of Internal Revenue (Govt. Ex. 34, R. 204, 205; Appendix B, *infra*, p. 28). A list of questions concerning petitioner's affairs, submitted to O'Gordon, together with the answers submitted by O'Gordon to special agent George H. McKusick, were also put in evidence over petitioner's objection (Govt. Exs. 70 and 71, R. 204-205).

Later McKusick, the special agent who investigated petitioner's tax returns (R. 189), was asked concerning an agreement or some agreements said to have been entered into by O'Gordon and Leonard H. Weinstock as to the amount of petitioner's living expenses during the years 1937 through 1947 (R. 345-346, 350-352). Weinstock, the public accountant who prepared the tax returns of petitioner and his wife from 1942 to 1951 (R. 264, 265), had a power of attorney executed April 5, 1951 to represent petitioner "in connection with all tax returns which have been filed with any department of the United States Government" (Govt. Ex. 35; Appendix B, *infra*, p. 29). Petitioner's counsel objected to such questions on the ground that these powers of attorney to O'Gordon and Weinstock

did not authorize them to make admissions which would be binding on petitioner in a criminal proceeding (R. 346-347, 352), but these objections were overruled and McKusick was permitted to testify to agreements made at different times by O'Gordon and Weinstock as to petitioner's living expenses, as follows (R. 349, 353):

	O'Gordon	Weinstock
1937.....		$ 6,000
1938.....		6,000
1939.....		6,000
1940.....	$ 6,000	6,000
1941.....	6,000	6,000
1942.....	6,000	10,000
1943.....	6,000	10,000
1944.....	9,000	10,000
1945.....	9,000	10,000
1946.....	15,000	12,000
1947.....	15,000	12,000

Weinstock himself had been called as a witness for the government and testified to having agreed with the government agents as to petitioner's maximum living expenses for the years 1942 through 1947 (R. 269). When he could not recall the amounts agreed upon (R. 269-270) he was, over petitioner's objection, cross-examined by the government for purposes of impeachment concerning testimony he had given before the grand jury on May 2, 1952, three and a half months after the return of the indictment in this case (R. 270-274).[2] The gist of his testimony before the grand jury was that Weinstock had agreed with the government agents that $10,000 per year for 1942-1945 and $12,000 per year for 1946-1947 should be considered as petitioner's

[2] Calling Weinstock before the grand jury long after the return of the indictment in this case was obviously a device employed by the government to question a presumably hostile witness in preparation for trial, rather than a bona fide investigation of other matters (see R. 271-272). We submit that such conduct on the part of the government is highly irregular and that it is a significant part of the context in which the questions raised in this petition concerning other aspects of the handling of this case should be considered.

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living expense, that before making this agreement he (Weinstock) had discussed the subject with petitioner, who was unwilling to accept these figures because he "thought they were too high in the later years" but "finally agreed it would be all right" (R. 274). On cross-examination by the defense Weinstock testified all the work he had done on the case had been with the thought in mind of bringing about a civil settlement (R. 277). He said that was his purpose in submitting the living expense figures to McKusick (R. 278). While Weinstock did not inform McKusick that this was his purpose and had never had any definite understanding with McKusick that the living expenses were agreed to in order to work out a civil settlement (R. 277, 278), McKusick himself had said the purpose of the living expenses agreement "was to reach a point of settling the case" (R. 276) or "to wind up the case" (R. 278). McKusick never denied making these statements, although he did deny that it had been his understanding that the purpose of an earlier conference with petitioner's representatives was to settle the civil tax liability (R. 394).

In connection with the examination of one of its last witnesses, Gerald O. Kleven, the government put into evidence over petitioner's objection a six-page document (Govt. Ex. 224, R. 454, 521) purporting to be "an analysis and a summary under the net worth method to show the income of [petitioner] from the years 1936, 1941, '42, '43, '44, '45, '46, and '47" prepared by Kleven from "the exhibits in this case and from the oral testimony adduced * * * as to facts" (R. 454). The years 1937 through 1940 are not included in Exhibit 224 because sufficient evidence was not found to produce an accurate net worth for those year-ends (R. 464). Also put into evidence over objection was a chart (Govt. Ex. 226, R. 522-524) prepared by Kleven purporting to show for the three prosecution years the taxable net income reported by petitioner, the taxable net income as claimed by the government, the income taxes as

reported, and the taxes the government alleges should have been but were not reported.[3]

The principal objection to the admission of these exhibits was that it invaded the province of the jury in that they reflected Kleven's understanding and interpretation of all the evidence in the case and were based upon his acceptance of part of the evidence and his rejection of part (R. 459-460, 523-524). The trial judge was under the impression that the admissibility of such exhibits had been sustained by this Court (R. 459).

Petitioner rested without putting on any evidence (R. 578), and his motion for acquittal made then and also earlier at the close of the government's case was denied (R. 576-578, 579).

Petitioner's requested instruction No. 1 dealt with circumstantial evidence and began with this sentence (R. 579): "For proof of its case, the government relies upon circumstantial evidence." The court gave the instruction on circumstantial evidence substantially in the language submitted by petitioner, except that the opening sentence quoted above was omitted (cf. R. 579-580, 621). Among petitioner's requested instructions which the court refused (R. 623) was request No. 11, as follows (R. 582):

> In this case the government relies on a claimed increase in the defendant's net worth in the years 1945, 1946 and 1947 to prove claimed unreported income during said years. The government's case must fail if the claimed net worth of the defendant at the starting point of the periods in question is not correct and has not been established beyond a reasonable doubt. A correct starting point must include all of the defendant's assets at that time as well as all of his liabilities. It is also incumbent upon the government to exclude any reasonable probability that the increase in net worth

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[3] For the purpose of explaining Exs. 224 and 226 to the jury, huge enlargements thereof were put into evidence as Govt. Exs. 225 and 227 (R. 457, 461, 521, 524-525). Because of their size and because they are merely duplicates, Exs. 225 and 227 were by stipulation omitted from the exhibits certified to this Court.

is attributable to capital assets or accumulations by the taxpayer in periods prior to the starting point of the net worth period in question.

In addition to establishing a correct starting point, it is incumbent upon the government to prove beyond a reasonable doubt the defendant's net worth for each year from the starting point up to and including the year 1947.

The jury returned a verdict of guilty on all three counts, and petitioner was given a general sentence of imprisonment for three years and a fine of $10,000 (R. 628, 634). On appeal the Court of Appeals held that there was no abuse of discretion in the denial of the motion to dismiss the indictment, adding that a trial court's exercise of discretion in such a matter "is not ordinarily reviewable" (C. A. Proceedings 9-10). The Court of Appeals likewise sustained the ruling of the trial court that the powers of attorney from petitioner to O'Gordon and Weinstock authorized them to make admissions which would be binding on petitioner in a criminal prosecution (C. A. Proceedings 11, 13), and upheld the admissibility of Exhibits 224 and 225, Kleven's summary and analysis of the evidence, and Exhibits 226 and 227, Kleven's calculation of the income taxes which should have been paid on the basis of the taxable net income on his summary and analysis (C. A. Proceedings 12-13). The Court of Appeals also approved the instructions given by the trial court, expressing the view that "as a whole the given instructions were more favorable to the defendant than were the requested instructions" (C. A. Proceedings 16-17).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In failing to hold that there was not a proper exercise of discretion by the trial court in denying the motion to dismiss the indictment, to require a disclosure of matters occurring before the grand jury, and to permit the furnish-

ing to petitioner's counsel of a transcript of the proceedings before the grand jury.

2. In holding that there was no abuse of discretion on the part of the trial court in the denial of the motion referred to above.

3. In failing to hold that the indictment herein was not an "indictment of a grand jury" within the meaning of the Fifth Amendment.

4. In holding that the powers of attorney given by petitioner authorized his agents to make admissions which would be binding on him in a criminal prosecution.

5. In holding that charts setting forth a summary and analysis of the evidence and a calculation of alleged unreported income, prepared by a witness testifying for the prosecution as an expert in an income tax evasion case, are admissible in evidence as exhibits.

6. In holding that the trial court properly refused petitioner's request for a charge that the government relies upon circumstantial evidence for proof of its case.

7. In holding that the trial court properly refused petitioner's requested instruction No. 11 covering the elements which must be established where income tax evasion is sought to be proved by the "net worth" method.

8. In affirming the judgment of the District Court.

REASONS FOR GRANTING WRIT

1. In *United States* v. *Johnson*, 319 U. S. 503, this Court said (319 U. S. at 507):

> Inasmuch as the initiation of prosecution through grand juries forms a vital feature of the federal system of criminal justice, the law governing its procedures and the appropriate considerations for determining the legality of its actions are matters of first importance.
> * * *

Since, in our view, some of the principal vices of the decision below stem indirectly from rulings of this Court in the *Johnson* case, and since the impact of the decision below on the operation of the grand jury system is potentially much more far-reaching than the decision reviewed by this Court in the *Johnson* case, we maintain that the proper administration of federal criminal justice requires a review here.

(a) The decision below offers the government the tempting opportunity to take advantage of the traditional secrecy of grand jury proceedings to obtain indictments in difficult income tax evasion cases in disregard of the requirements of the Fifth Amendment. This can best be understood by noting the sharp contrast on the facts betwen the present case and the *Johnson* case. Although both were tax evasion prosecutions of an exceedingly complex nature,[4] with the government's evidence of unreported income being entirely circumstantial, in the *Johnson* case the grand jury's investigation lasted almost four months, which the government said was essential, while here the grand jury took evidence for less than one hour, which the government insists was ample.

We believe that this surprising contrast results indirectly from this Court's ruling in the *Johnson* case that an expert witness may testify to the defendant's income and expenditures during the indictment years, i.e., the ultimate facts to be determined by the jury, basing such testimony on his own analysis of the evidence. 319 U. S. at 519-520. Opinion evidence as to the guilt of an accused having been approved

[4] In the *Johnson* case the Circuit Court of Appeals held the indictment void as having been returned by an illegally constituted grand jury. This conclusion was reached on the court's construction of the order authorizing the grand jury to continue to sit for a further term as permitting the grand jury to finish not merely investigations begun during its original term but also investigations begun during an intervening term. The government's petition for certiorari dwelt on the length of time required for proper investigation of tax evasion cases by the grand jury and complained that "[t]he ruling of the court below substantially impedes the carrying out of an essential function of grand juries, the thorough investigation of complex cases" (Petition, No. 4, October Term 1942, p. 16).

for use before the petit jury, it would be illogical not to assume that such evidence was being used before the grand jury as well. And when, as here, the grand jury returns an indictment in a complex tax case after hearing testimony of a single witness for less than one hour, common sense tells us that this must have been done by permitting a single "expert" to give a quick summary of what the government's proposed witnesses would testify to and his opinion as to what the proposed documentary evidence will tend to prove. Only in this way could there have been such timetable accuracy in scheduling, with the newspapers informed three or four days in advance that the grand jury would meet on the morning of a certain day and by noon return an indictment against petitioner (R. 8).

Nor can it be said that the decision here turns on the facts of this case and hence would have no bearing on other cases. The showing made by petitioner here is as strong as an accused could reasonably be expected to ever make in any case. Although McKusick, the witness who testified before the grand jury, was an important witness at the trial, there were 45 other witnesses at the trial also, and obviously the summary of the evidence set forth in the opinion of the court below is a summary of *all* the evidence and not merely of McKusick's testimony (C. A. Proceedings 8, 10). Moreover, the court below made no mention of the more than 200 exhibits put into evidence at the trial; had these documents been exhibited to the grand jury during the time it devoted to this case the entire panel would have had an average of less than twenty seconds to examine each document, with no time whatever allowed to hear testimony or to deliberate. Unquestionably the "short cut" method by which the indictment was obtained here could be employed in any case.

(b) The court below, by limiting its consideration of Rule 6(e) of the Federal Rules of Criminal Procedure to the provision that grand jury proceedings may not be disclosed to defendant nor to his counsel unless "permitted

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by the court * * *" (C. A. Proceedings 9), warped the meaning of that Rule by such undue emphasis on this small portion. Rule 6(e) calls for disclosure of grand jury proceedings "when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." If the showing made here was not sufficient to establish "that grounds may exist for a motion to dismiss," we doubt that a sufficient showing could ever be made in any case. And there can be no claim that the facts alleged were not proved, for the trial court assumed them to be correct (R. 57-58).

In any event, the record discloses that there was no proper exercise of judicial discretion by the district judges in passing on the motion to dismiss. Judge Donovan did not rule on it, but merely passed it over for determination at the trial of the general issue (R. 21), stating in the memorandum attached to his order that "[r]emoval of the veil of secrecy from what transpired in the presence of [the grand jury] in my opinion is not warranted *at this stage of the proceeding*" (R. 22; emphasis supplied). When the motion was renewed at the time the case was called for trial Judge Bell, who was then presiding (R. 44), was taken by surprise (R. 57), and he ruled on the motion in these terms (R. 58):

> * * * I dislike to go into a case if there is some substantial showing that a matter of this kind should have preliminary consideration, and yet this case has been set for trial for six or seven weeks, even [sic] since I returned and have had something to do with it. A jury has been ordered here to start the trial of this case and I am inclined to think that this motion should be overruled and that the trial should be commenced. That will be the order of the Court.

The clear inference from this language is that Judge Bell overruled the motion even though a substantial showing had been made because the case had been set for trial for

a long time, a jury had been ordered and was on hand ready for the trial, and he did not wish to delay the start of the trial with further consideration of this preliminary matter. Such a ruling is not, we submit, entitled to consideration on appeal as an exercise of judicial discretion. Cf. *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U. S. 474, 483; *Mattox* v. *United States*, 146 U. S. 140, 147; *Felton* v. *Spiro*, 78 Fed. 576, 581 (C. C. A. 6, 1897).

(c) The decision of the court below deprives petitioner of a substantial constitutional safeguard and opens the way for many others to be similarly deprived. The Fifth Amendment provides in part that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury", with certain exceptions not here material. The statute under which petitioner was prosecuted (26 U. S. C. § 145(b)) authorizes imprisonment for a violation, hence the offense described in that statute is an "infamous crime" within the meaning of that term as used in the Fifth Amendment. *Mackin* v. *United States*, 117 U. S. 348. Thus an "indictment of a grand jury" was indispensable here to the power of the court to try petitioner for the crime with which he is charged. *Ex parte Bain*, 121 U. S. 1, 12-13. But a grand jury can properly find an indictment only on competent legal evidence such as would be legitimate and proper before a petit jury, and it may not indict on current rumors, unverified reports, evidence of what third persons have said, or other hearsay. *United States* v. *Rubin*, 218 Fed. 245, (D. Conn., 1914); *In re Grand Jury*, 62 Fed. 840, 846 (N. D. Cal., 1894); *United States* v. *Kilpatrick*, 16 Fed. 765, 771 (W. D. N. C., 1883); *United States* v. *Farrington*, 5 Fed. 343 (N. D. N. Y., 1881); *Charge to Grand Jury*, 2 Sawy. 667, 670, 30 Fed. Cas. 992, 993-994 (C. C., D. Cal., 1872; by Field, J.); 1 Chitty Crim. Law 318; see *Hale* v. *Henkel*, 201 U. S. 43, 65-66. As for the *quantum* of evidence necessary to sustain an indictment, it must be such as, unexplained and uncontradicted, would warrant

a conviction by a petit jury. *Charge to Grand Jury, supra; Charge to Grand Jury,* Taney 615, 616-617, 30 Fed. Cas. 998, 999 (C. C., D. Md., 1836; by Taney, J.); 4 Bla. Com. 303; 1 Chitty Crim. Law 318.

We maintain, therefore, that an indictment found on improper evidence is not the "indictment of a grand jury" required by the Fifth Amendment, and that a substantial showing that an indictment was so found raises a constitutional question going to the jurisdiction of the court.[5] This is not to say that any challenge of an indictment, however flimsy the grounds, demands such an inquiry. But if the constitutional guaranty is to mean anything there must be a point where a showing of irregularity in the grand jury's proceedings requires investigation by the court.

The relief which petitioner sought in the trial court in this matter would not have involved a significant impairment of the traditional secrecy of grand jury proceedings. This Court has already recognized that after an indictment is returned and the accused taken into custody, the secrecy of the grand jury proceedings can be relaxed where justice requires it. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 234. Important considerations which usually call for secrecy up to that point did not exist here, as the newspapers had already been informed three or four days in advance of what was to transpire (R. 8). Full disclosure has been granted in other cases on facts analogous to those here. *United States* v. *Rubin*, 218 Fed. 245 (D. Conn., 1914); *United States* v. *Kilpatrick*, 16 Fed. 765, 771 (W. D. N. C., 1883); *United States* v. *Farrington*, 5 Fed. 343 (N. D. N. Y., 1881).

"The grand jury is the great inquest between the government and the citizen," as Mr. Justice Story said. *United States* v. *Coolidge*, 2 Gall. 364, 25 Fed. Cas. 622, 623 (C. C.,

[5] We also believe that the "due process of law" guaranteed by the Fifth Amendment, properly construed, applies to grand jury proceedings and requires that indictments be found in accordance with the principles set forth above. We recognize that this Court has expressed itself to the contrary in *Hurtado* v. *California*, 110 U. S. 516, 534, and respectfully submit that that decision should be reconsidered.

D. Mass., 1815). In this case, however, the grand jury was no more than a rubber stamp for the government accusing the citizen, its indictment reflecting the opinion of the government investigator rather than the considered, independent judgment of the grand jurors themselves, reached after a personal consideration of competent evidence that an offense had been committed. We submit that such a paper is not an "indictment of the Grand Jury" within the meaning of the Fifth Amendment, and that therefore the judgment below raises an important constitutional question which this Court should decide.

2. (a) In holding that the agency created by the powers of attorney given by petitioner to O'Gordon and Weinstock authorized the agents to make admissions binding on their principal in a criminal prosecution the court below relied upon the decision of this Court in *American Fur Co.* v. *United States*, 2 Pet. 358 (C. A. Proceedings 11). The justification for its ruling was found by the court below in this Court's assertion in the *American Fur Co.* case (2 Pet. at 364) that "whatever an agent does or says, in reference to the business in which he is at the time employed, and within the scope of his authority, is done or said by the principal; and may be proved, as well in a criminal as a civil case; in like manner as if the evidence applied personally to the principal" (C. A. Proceedings 11).

However, the *American Fur Co.* case involved an agent who had acted for, or in association with, his principal in the commission of the alleged offense and not, as in the instant case, an agent appointed long after the alleged crime was committed. Thus, by taking the above language out of context, the court below has so seriously misconstrued a decision of this Court as to call for review. The true rule of the *American Fur Co.* case is to be found in the last sentence of the same paragraph from which the above quotation was taken (2 Pet. at 365):

> * * * For we hold the law to be, that where two or more persons are associated together for the same

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illegal purpose, any act or declaration of one of the parties, in reference to the common object, and forming a part of the *res gestae*, may be given in evidence against the others; and this we understand, upon a fair interpretation of the opinion before us, to be the principle which was communicated to the jury.

(b) Moreover, the construction given the powers of attorney in this case[6] affects virtually every taxpayer who is involved in a controversy with the Treasury Department. These powers of attorney were given pursuant to the requirement of Paragraph II of the Conference and Practice Requirements of the Bureau of Internal Revenue, which provides that no attorney or agent shall appear or be recognized in any matter unless he files a power of attorney "in proper form authorizing him to prosecute the case, claim, or matter in question * * *." Technical words are not necessary (Paragraph V-A), and no prescribed form is given. Paragraph V-C of the Conference and Practice Requirements provides: "The authority delegated to an attorney or agent in a power of attorney enumerating certain specific acts which may be done will be considered limited to those acts. * * *" That paragraph goes on to provide further that there must be express authority given to permit the attorney (1) to receive checks, (2) to substitute another attorney, (3) to execute a consent to extend the statute of limitations for assessment of a tax, and (4) to execute closing agreements relative to tax liability.

Thus every intendment of these Treasury Department regulations is that the powers of attorney given thereunder shall be strictly construed, that they limit representation to the civil aspects of tax matters, and that without express authorization they shall not be construed as permitting the attorney to bind his principal on any definitive step in the negotiation. The only reported judicial decision on this subject followed the strict construction view, the court there refusing to recognize a waiver by the taxpayer's attorney

[6] These powers of attorney are printed in Appendix B, *infra*, pp. 28-30.

of future claims for depreciation, where the power of attorney extended only to the years under consideration. *Elrod Slug Casting Machine Co.* v. *O'Malley*, 57 F. Supp. 915, 922 (D. Neb., 1944).

This sudden change from a construction giving limited power to bind civilly to a construction giving unlimited power to bind criminally is grossly unfair and exposes thousands of taxpayers to consequences the Treasury Department regulations would never lead them to expect. The decision of the court below alters adversely the position of every taxpayer who has obtained representation to assist in the negotiation of a tax controversy with the Treasury Department, and for this reason also it should be reviewed.

3. In the *Johnson* case this Court sustained the admissibility of expert testimony as to the defendant's net income and unpaid income tax during the disputed period.[7] In the present case the court below, citing the *Johnson* case (C. A. Proceedings 12), approved the admissibility of exhibits prepared by an expert witness showing his analysis of the evidence and his calculations of petitioner's income and expenditures, with the amount of income tax the Government claimed was unpaid. This ruling goes considerably beyond the *Johnson* decision, for with the expert's conclusions reduced to the form of exhibits the jury had a written record of them to take to the jury room. There was no means by which petitioner could make available in the jury room a written record of the cross-examination of the expert showing the extent to which his conclusions on the ultimate issue in the case, *i.e.*, whether petitioner had substantial unreported net income in the prosecution years, were based on his appraisal of conflicting evidence.

Unquestionably a written record carries more weight in the jury room than the uncertain recollection of the jurors. Cf. *United States* v. *Davis*, 103 Fed. 457, 470 (C. C., W. D. Tenn., 1900). Thus the ruling below represents a significant extension of the *Johnson* decision, in that it de-

[7] In the *Johnson* case the conclusions of the expert witness were given orally and were not submitted to the jury in written form. Record, Vol. IV, pp. 13-18, Nos. 4 and 5, October Term 1942.

prives a defendant of the full benefit of his cross-examination of a government expert, the only means by which a defendant can bring to the attention of the jury the extent to which the expert's conclusion rests on decisions which the jury is entitled to make for itself. The effect of the decision below will be felt in virtually every criminal prosecution for tax evasion or for any other offense involving complicated factual situations, giving the government an advantage it has not heretofore enjoyed. Such a far-reaching innovation in criminal prosecutions should be carefully scrutinized by this Court.

We believe that in the course of such review the ruling in the *Johnson* case sustaining the admissibility of expert testimony as to the ultimate issue in a tax evasion prosecution should be reconsidered. The exclusion of such evidence would not work any hardship on the government in the prosecution of even the most complex tax evasion cases. Summarizing the scattered bits of evidence and drawing them together to present one complete picture to the jury can and should be done by government counsel in his summation, using a blackboard, a chart prepared in advance such as was used by the expert in this case, or any other similar visual aid. The difference would be that by this procedure the drawing of conclusions from evidence before the jury would be restricted to the realm of advocacy, where it belongs, and would be kept out of the witness chair, where it has no place except in special types of actions such as eminent domain proceedings.

4. The Fifth Circuit in *Bryan* v. *United States*, 175 F. 2d 223,[8] and the Seventh Circuit in *United States* v. *Fenwick*, 177 F. 2d 488, held that a conviction in a tax evasion case prosecuted on the net worth theory could not be sustained unless the government had established an accurate net worth for the defendant at the beginning of the prosecution year. In each of those cases the conviction was re-

[8] Affirmed by this Court, 338 U. S. 552, on a ground other than that for which it is cited here.

versed because of the failure of the government to prove an accurate starting point. In view of these decisions—indeed, even without them—petitioner was entitled to have the jury instructed as to the elements of a net worth case, including the necessity for the establishment of an accurate starting point. Petitioner's requested instruction No. 11 covering this point was refused by the trial court (R. 582, 623), and no instruction whatever was given in its place. This omission from the instructions to the jury was not discussed in the opinion of the court below, which held generally that the trial "court most carefully protected the rights of the defendant and that as a whole the given instructions were more favorable to the defendant than were the requested instructions" (C. A. Proceedings 17).

True enough, the *Bryan* and *Fenwick* decisions represent a stricter view of the burden of proof which rests on the government in prosecuting an income tax evasion case on the net worth theory than the court below adopted in *Schuermann* v. *United States*, 174 F. 2d 397, certiorari denied, 338 U. S. 831. But if federal appellate courts cannot agree on this important question obviously laymen composing a petit jury would be confused as to the proper standards and would require instruction from the court. Some kind of instruction was particularly necessary here. Whereas in the *Bryan*, *Fenwick* and *Schuermann* cases the courts were dealing with the true starting point, *i.e.*, the beginning of the first prosecution year, the actual starting point here was eight years prior to the beginning of the first prosecution year (C. A. Proceedings 8) and the government admittedly could not establish an accurate net worth for petitioner for the year-ends from that starting point down to the beginning of 1945 (R. 464).

Certainly if this case was so complex as to require an expert to explain the evidence to the jury, then it also required a full and complete explanation of the applicable law, yet the trial court remained silent on this point and even

refused to charge that the government relied for proof of its case on circumstantial evidence (R. 579, 621, 623).

In affirming the judgment despite the fact the trial court had refused to charge on a basic feature of the law of the case, the Court of Appeals so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH B. KEENAN,
ALVIN O. WEST,
JOHN W. GRAFF,
Counsel for Petitioner.

August, 1953.

APPENDIX A

1. Amendment V to the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. Federal Rules of Criminal Procedure:

Rule 6. The Grand Jury

* * * * * * * *

(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

3. Excerpts from regulations of the Bureau of Internal Revenue, Department of the Treasury, 26 CFR § 601.4(d) (1949 Ed.):

(d) *Conferences.* The Bureau has a liberal policy relative to discussion of disputed tax liability. Opportunity for conference is generally accorded either in the office of the collector or one of the other Bureau offices. Application for such a hearing should be made in person, or preferably by letter. The rules governing conferences are set forth in "Conference and Practice Requirements, Bureau of Internal Revenue, Revised February, 1942", published in the Internal Revenue Bulletin, 1942-1, page 384. Such Conference and Practice Requirements read as follows:

Conference and Practice Requirements, Bureau of Internal Revenue; Revised February 1942

* * * * * * * *

Power of Attorney To Be Filed and Evidence of Enrollment To Be Submitted Before Recognition Is Accorded

II. No attorney or agent representing a claimant or other person before any of the offices of the Bureau of Internal Revenue shall appear or be recognized in any case, matter, claim, or other proceeding or business pending in such office unless the attorney or agent representing the claimant presents and files a power of attorney, or a certified copy thereof, from his principal in proper form authorizing him to prosecute the case, claim, or matter in question. Such power of attorney shall always be filed and evidence of enrollment submitted before such attorney or agent is recognized. In the event, however, that an attorney or agent presents himself for conference who is not familiar with this requirement, or who can show that he has not had reasonable opportunity to obtain a power of attorney from his client, or who has not applied for enrollment, but is able to produce such evidence as will reasonably convince

the Bureau's representative that he has authority to represent the taxpayer, such attorney or agent may be heard with the understanding that a power of attorney in proper form and evidence of enrollment will be promptly forwarded to the Bureau, and that until such power of attorney and evidence of enrollment shall have been filed information will not be disclosed to such attorney or agent relative to the Bureau's attitude in respect of the issues raised or to any other matter relating to the taxpayer's case.

* * * * * * * *

Power of Attorney Requirements

V. Any power of attorney offered in evidence in any case will be accepted only if it is in regular form. Only one power of attorney shall be in effect in any case and there shall be included in such power of attorney the names and addresses of all attorneys or agents to whom the taxpayer has delegated authority to represent him.

A. *Technical language unnecessary.* It is considered necessary in all cases that the power of attorney contain language to convey the principal's intention, although not necessarily in strictly legal form.

* * * * * * * *

C. *Extent of authority delegated.* The authority delegated to an attorney or agent in a power of attorney enumerating certain specific acts which may be done will be considered limited to those acts.

(A) *Express authority required for certain acts.* Express authority to do the following acts must be granted and shown in the power of attorney or such acts will be considered beyond the scope of the agent's authority:

1. To receive but not to indorse and collect checks in settlement of any refund. (See section 3477 of Revised Stat-

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utes, which prohibits assignments of claims or portions thereof, and title "Checks in payment of refunds," paragraph XXI herein.)

2. To delegate authority or to substitute another agent or attorney.

3. To execute consents agreeing to a later determination and assessment of taxes than is provided by statute of limitations.

4. To execute closing agreements relative to the tax liability.

* * * * * * * *

APPENDIX B

Government's Exhibit 34

KNOW ALL MEN BY THESE PRESENTS:

That, I, Thomas W. Banks, of the City of Minneapolis, County of Hennepin, State of Minnesota, do hereby appoint J. A. O'Gordon, of the City of Minneapolis, Hennepin County, State of Minnesota, my attorney for and in my name and stead, to act for me before and with the Internal Revenue Department of the United States, in matters now pending with reference to all taxes assessed against me, and to all matters which may lead to further assessments against me.

Giving and granting unto my said Attorney full power and authority to do and perform all and every act and thing whatsoever, requisite, necessary or proper to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present, hereby ratifying and confirming all that my said attorney shall lawfully do, or cause to be done by virtue hereof.

IN WITNESS HEREOF I have hereunto set my hand and seal this 22nd day of November, 1950.

(s.) THOMAS W. BANKS

In the presence of
(s.) BEN R. TOENSING

Subscribed and sworn to before me this 22nd day of November, 1950.

(s.) BEN R. TOENSING
Notary Public in and for
Hennepin County, Minnesota

My Commission expires Nov. 3, 1953.

GOVERNMENT'S EXHIBIT 35

AUTHORITY TO REPRESENT TAXPAYER

To the Commissioner of Internal Revenue
Washington, D. C.

Sir:

Leonard H. Weinstock is authorized to represent me in connection with all tax returns which have been filed with any department of the United States Government. The said representative is authorized to act for me and in my name, place and stead. This letter will serve as written authority authorizing him to examine and secure copies of all returns, claims, correspondence, and papers in connection therewith. This letter will also serve as written authority authorizing him to receive any warrants which may be issued in my name. I hereby specifically authorize the above mentioned representative to secure, if necessary, copies of any income tax returns heretofore filed by me. I hereby specifically authorize Leonard H. Weinstock to enter into and to execute final agreements as provided for under Section 606 of the Revenue Act of 1928. Prior authorizations, if any, are hereby revoked.

The said representative is vested with full power of substitution and revocation. The execution of this instrument hereby ratifies and confirms all the said representative shall lawfully do or cause to be done, by virtue hereof.

Respectfully,

(s.) THOMAS W. BANKS

State of Minnesota
County of Hennepin, ss.

On this 5th day of April, 1951, before me, a Notary Public within and for the said County, personally appeared Thomas W. Banks who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

(s.) FLORENCE S. CUNDIFF
Notary Public

(SEAL.)

FLORENCE S. CUNDIFF
Notary Public,
Hennepin County, Minn.

My Commission expires Dec. 20, 1953.

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